

Concentration of Powers in the Federal Executive: The Application of Emergency Powers in Switzerland

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Were we ready for the crisis? I do not mean whether Switzerland had enough hospital beds and ventilators, but whether its Federal Constitution was ready. Arguably, the former are vital, and as regards the latter, Switzerland is under no suspicion of losing its quality as a democracy and a *Rechtsstaat*. Still, the constitutional questions raised by the Corona crisis are troubling. The federal government is applying emergency powers unheard of since WW2, and which were previously unimaginable for most. Legal scholars are only starting to grapple the full implications of the crisis.

The following contribution will highlight areas that may be considered as the hot spots of the legal challenges in Switzerland. It will describe the basis for the emergency measures in place and analyze them in their constitutional context and with respect to the role of Parliament and the Swiss cantons (states), before offering a brief conclusion.

Emergency Powers of the Federal Government

The Constitution

In times of crisis, important decisions must be taken quickly. Typically, such powers shift to the executive branch. Switzerland is no exception. The Federal Council takes measures to safeguard external security, independence and neutrality of Switzerland. According to Article 185(3) of the Swiss Constitution, the Swiss Federal Council may issue ordinances and administrative acts in order to counter existing or imminent threats of serious disruption to public order or internal or external security. A "sister" provision is located in Article 184(3) of the Constitution, concerning measures in respect to foreign policy (closing borders etc.).

It is undisputed that the current pandemic qualifies as an "imminent threat of serious disruption to public order or internal or external security" under article 185(3) of the Swiss Constitution. Less certain is the question whether the Constitution not only allows police measures, but also financial ones aiming to address the social and economic hardship that follows from the lock-down. The Federal Council invoked this provision in order to support the Swiss bank UBS in 2008, but many doubted the constitutionality of this help. However, newer doctrine tends to include social and economic emergencies and measures addressing them.

The Epidemics Act

The Swiss Epidemics Act of September 28, 2012 (EpA; *Bundesgesetz über die Bekämpfung übertragbarer Krankheiten des Menschen vom 28. September 2012, Epidemiengesetz*, EpG) distinguishes between the normal, the special and the exceptional situation as far as communicable diseases are concerned. Switzerland quickly moved to the exceptional situation, proclaimed by the Federal Council on March 16, 2020. In these circumstances, Article 7 EpA applies. It reads as follows:

"If an exceptional situation requires it, the Federal Council can order the necessary measures for the whole country or for individual parts of the country."

The Federal Council's dispatch (*Botschaft*) accompanying this provision states that this article is merely declaratory and says nothing more than the constitution itself. There was no debate on this article during the parliamentary deliberations. With hindsight, both the Federal Council and Parliament (as well as scholars) have missed the opportunity to clarify one of the key questions of the current pandemic, i.e. the relationship between this provision and Article 185(3) of the Swiss Constitution, on the one hand, and existing laws and the Constitution, on the other hand.

Empowerment

Contrary to what happened in the context of WW2, the Swiss Parliament has not adopted – and is not planning to adopt – any "empowerment act" ("*Vollmachtenbeschluss*") or any similar legal basis. Currently, the Federal Council is exclusively acting based on the Constitution and on the Epidemics Act.

Emergency Measures of the Federal Government (Federal Ordinances)

The Federal Council has enacted several ordinances on the Coronavirus. One key ordinance, the so-called Ordinance 2 on Measures to Combat the Coronavirus (COVID-19) (*Verordnung 2 über Massnahmen zur Bekämpfung des Coronavirus (COVID-19)*) regulates the lockdown. It is less strict than in some other countries. There is no curfew, but the population and especially vulnerable persons are urged to stay at home. Social gatherings are prohibited, and distancing is key. Universities, schools, museums, restaurants and most businesses with customers are closed but not the industry (see, however, Article 7e of the COVID-19 ordinance, whereby "the Federal Council may in response to a justified request authorize the canton concerned to restrict or suspend the activities of certain sectors of the economy for a limited time and in specific regions"), supermarkets, and hotels. Some cautious re-openings are planned from the end of April through mid-June.

This main ordinance is flanked by a myriad of other ordinances of the Federal Council. They concern financial aid which is lent by private banks but fully guaranteed by the Confederation up to the amount of CHF 500'000. Other ordinances facilitate short-term work for enterprises, or concern special areas such as culture, sports, education etc. Notably, the Federal Council has also cancelled various deadlines, not only in debt enforcement and court proceedings, but also in the area of political rights. In any case, the federal competencies are used broadly to say the least. They affect everyone's life in some aspect or other.

Emergency Measures – Constitutionality?

Before the Corona crisis, many scholars considered the emergency powers of the federal government as relatively restrained compared to other countries and to the constitutions of some cantons (states) in Switzerland. Indeed, more extensive emergency powers were rejected by Parliament during the deliberations on the new Swiss Constitution of 1999.

It was generally assumed that the Federal Council is bound to the constitution when invoking its emergency powers. Arguably, the Federal Council is also bound to federal laws. To be more precise, it may invoke the emergency powers only when a legal basis is missing, and it cannot create a legal basis that contradicts existing federal law (*praeter legem*, not *contra legem*). However, a closer look reveals that in the current crisis, the Federal Council has often amended federal law, and that it has actually done so quite openly by stating which provisions of federal law do not apply or apply differently under the federal ordinances. The Federal Council has thereby assumed powers that were typically reserved to Parliament.

Furthermore, several provisions of the federal ordinances are in contradiction with the Constitution. Some deadlines in respect to political rights are regulated in the Constitution but are now affected by the federal ordinances. Some measures of the federal government clearly fall in the competences of the cantons. Contrary to conflicts with federal legislation, the Federal Council has neither highlighted these conflicts nor issued any statement in this regard.

To date, there has been little criticism of the measures of the federal government. Legal scholars have not yet published comprehensive journal articles, but some contributions are expected in the next few weeks and months. From preliminary exchanges, it may be assumed that there will be voices criticizing the Federal Council for overstepping the constitutional limits of its emergency powers. Others will defend the federal government. From a practical standpoint, it was difficult if not impossible for the Federal Council not to react. Legally, one may contend that the emergency powers have been gradually understood more extensively in the past, so as to include not only police action, but also measures aiming to address economic and social hardships. Additionally, the Epidemics Act may also serve as a basis for extensive governmental measures – or at least as an argument that when passing the Epidemics Act, the Federal Parliament accepted far-reaching measures by the Federal Council in case of a pandemic.

Personally, I believe that the Constitution allows federal ordinances to correct federal laws if the (strict) requirements for an emergency are met. Indeed, arguing to the contrary would mean that the Federal Council's emergency powers would be severely restricted. More troublesome are federal ordinances in contradiction with the Constitution. Such derogations must be considered as *ultima ratio* and must be swiftly approved by the Federal Parliament.

Emergency Measures – The Role of Parliament

Self-Suspension of the Federal Parliament

The Federal Parliament was in session during the height of the crisis. Still, on March 15, 2020, the offices of both chambers decided to abort the session – although one chamber, at the beginning of the same week, explicitly rejected such a motion. The offices also suspended all committee meetings.

The decisions of the offices attracted widespread criticism. It is doubtful that these decisions were legally correct; the offices of the chambers have mainly an administrative function and their members do not enjoy superior authority compared to the other MPs (see expert opinions). However, it is fair to say that the situation in Switzerland was critical and that the decisions were taken under substantial time pressure. It is also understandable that Parliament wanted to show its resoluteness to contribute its share in fighting the crisis.

It is less understandable that the subsequent holding of an extraordinary session was first requested by the Federal Council, and not by the MPs themselves. Only after the request of the Federal Council did members of the senate file a corresponding request. This request was symbolic, as it does not matter whether Parliament is convened by the request of the government or by a quarter of the members of a council (see Article 2 Federal Act on the Federal Assembly of 13 December 2002, Parliament Act, ParlA). The extraordinary session will start in mid-May. That is a late response.

This is not to say that the Parliament was completely inactive. Parliament is immediately needed when it comes to emergency spending. A delegation of both chambers must approve immediate expenses and appropriation credits, which it did.

Approval and Oversight

What is the role of Parliament vis-à-vis the federal ordinances regulating everyday life? A newer provision of the Government and Administration Organization Act stipulates that emergency ordinances of the government must be ratified by Parliament after six months at the latest (Article 7d of the Government and Administration Organization Act of 21 March 1997, GAOA). However, in my view, this article provides not only for a maximum duration: it also requires immediate action both from the Federal Council and Parliament. As discussed, many of the provisions of the federal ordinances alter federal law and some are even in contradiction with the Constitution. Such a far-reaching application of the executive emergency powers seems permissible only if these powers are brought back to the realm of the rule of law as quickly as possible. Only Parliament can do so.

Parliament has its own clause enabling it to enact emergency legislation (Article 165 of the Swiss Constitution; there is another clause in article 173 lit. c of the Constitution, which is however less clear concerning its boundaries, and which provides for measures that are not much faster in passing than ordinary emergency legislation of Parliament; hence, this second clause is rarely used). Federal

legislation may be declared urgent by an absolute majority of the members of each of the two chambers and be brought into force immediately. Contrary to what applies to other federal laws, the right to a referendum is temporarily suspended in the case of parliamentary emergency legislation. Most importantly, emergency legislation of the Parliament must not necessarily have a constitutional basis. Acts *praeter constitutionem* are possible (but limited concerning their duration). It goes without saying that Parliament can also correct all contradictions between existing federal laws and executive ordinances by passing emergency legislation. Hence, only Parliament can legally resolve the tension – if not conflict – between the measures in place on one hand, and federal law and the Constitution on the other. It should do so as quickly as possible.

Emergency Measures – Federalism

Switzerland is a federalist state. From a Swiss perspective, it is interesting to see that the equivalent of the powers now assumed by the federal government rest within the states in the US and with the *Länder* in Germany (which is surprising, as the *Länder* have less competences than the Swiss cantons).

The main federal ordinance concerning the Coronavirus has triggered a debate on the residual powers of the cantons. It is clear from the text that the cantons may still regulate questions not covered by the federal ordinances. Still, it is unclear what shall happen to areas that have been addressed by the Federal Council only vaguely or in principle.

The Federal Council has resolved one conflict with the canton of Ticino (at the border to Italy), which had introduced stricter measures than on the federal level. Legally, this was doubtful, but the Federal Council retroactively introduced a clause allowing for such exceptions – a move that is creative from a legal standpoint, but presumably politically wise. The Federal Council also authorized the canton of Ticino to extend the lockdown by one week, contrary to what applies to the rest of the country.

Conclusions

It is certainly too early to draw meaningful conclusions from the current situation. Still, I think that the extent of the current crisis shows that emergency measures should not be the task of the executive only. True, it is necessary that the executive moves first, as it has the shortest response time. Still, in a crisis that presumably lasts longer, it is the task of Parliament to legitimize emergency measures from the executive and – at least in Switzerland – to provide for a solid legal basis of such measures.

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